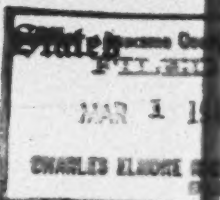


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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 451-454



No. 451

ANDREW W. COMSTOCK, a holder of Missouri Pacific Railroad Company
5¼% Secured Serial Gold Bonds, on behalf of himself and others holding
upward of \$900,000 principal amount of said bonds,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS, holding First and Refund-
ing Mortgage 5% Gold Bonds of Missouri Pacific Railroad Company,
et al.,

Respondents.

No. 452

NEW ORLEANS, TEXAS AND MEXICO RAILWAY COMPANY,
Debtor, by ANDREW W. COMSTOCK, representing himself and
others, etc.,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS, holding First and Refund-
ing Mortgage 5% Gold Bonds of Missouri Pacific Railroad Company,
et al.,

Respondents.

No. 453

GUY A. THOMPSON, Trustee of the New Orleans, Texas and Mexico
Railway Company, by ANDREW W. COMSTOCK, representing himself
and others, etc.,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS, holding First and Refund-
ing Mortgage 5% Gold Bonds of Missouri Pacific Railroad Company,
et al.,

Respondents.

No. 454

ANDREW W. COMSTOCK,

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v.

GUY A. THOMPSON, Trustee of New Orleans, Texas and
Mexico Railway Company, Debtor, *et al.*,

Respondents.

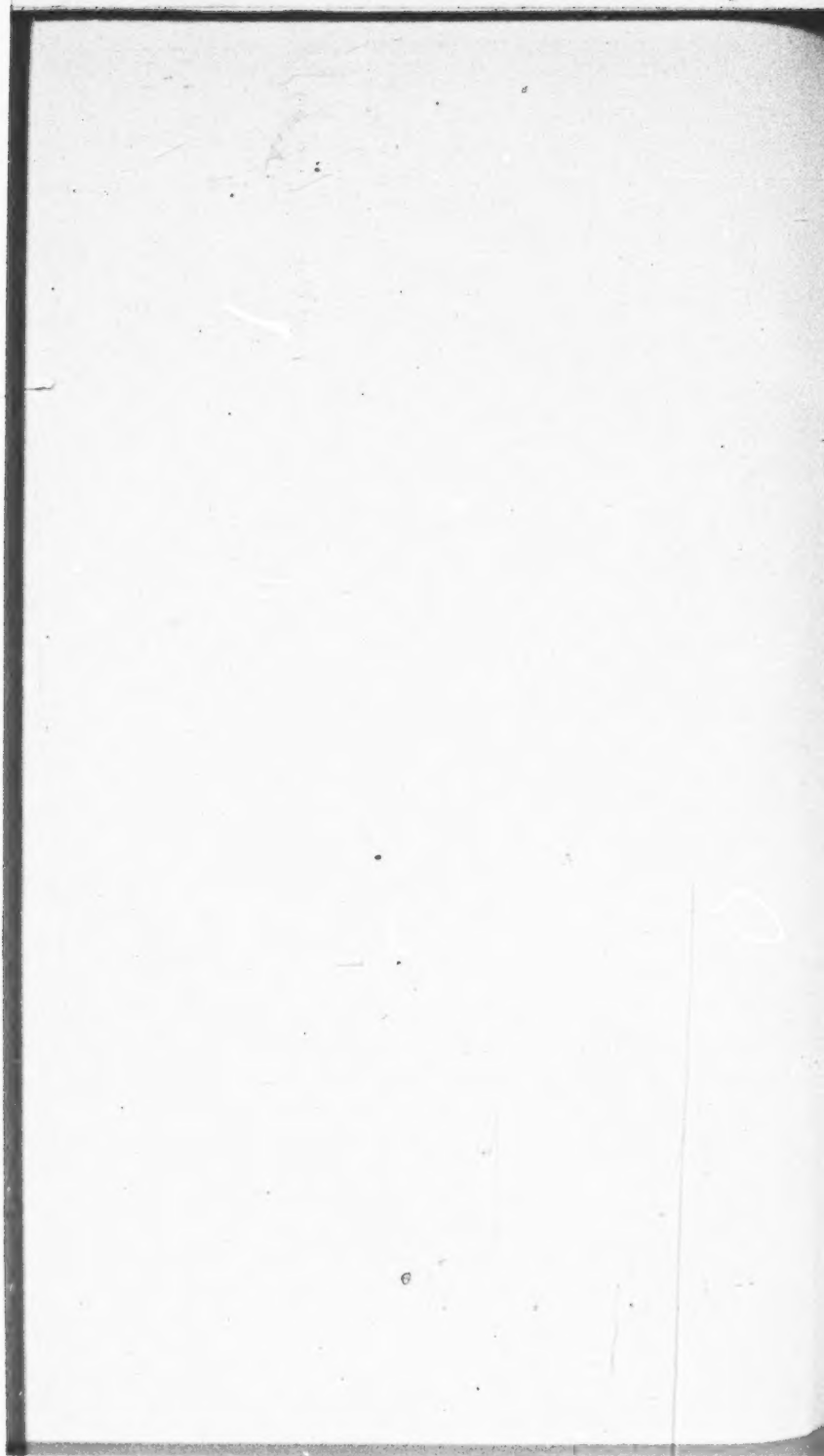
**MOTION AND BRIEF OF CONVERTIBLE
BONDHOLDERS GROUP, RESPONDENTS**

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Filed February 28, 1948.



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ABBREVIATIONS USED IN THIS BRIEF

International Great Northern—IGN
 Interstate Commerce Commission—"ICC" or "Commission"
 Missouri Pacific R. R. Co., principal debtor, herein—MOP
 New Orleans, Texas and Mexico Railway Company—NOTM
 Reconstruction Finance Corporation—RFC
 Railroad Credit Corporation—RCC
 Record on Appeal, Volume IV—R, IV.
 Record on Appeal, page —R. p.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 451-454

No. 451

ANDREW W. COMSTOCK, holder of Missouri Pacific Railroad Company
5 $\frac{1}{4}$ % Secured Serial Gold Bonds, on behalf of himself and others holding
upward of \$700,000 principal amount of said bonds,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS, holding First and Refund-
ing Mortgage 5% Gold Bonds of Missouri Pacific Railroad Company,
et al.,

Respondents.

No. 452

NEW ORLEANS, TEXAS AND MEXICO RAILWAY COMPANY,
Debtor, by ANDREW W. COMSTOCK, representing himself and
others, etc.,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS, holding First and Refund-
ing Mortgage 5% Gold Bonds of Missouri Pacific Railroad Company,
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Respondents.

No. 453

GUY A. THOMPSON, Trustee of the New Orleans, Texas and Mexico
Railway Company, by ANDREW W. COMSTOCK, representing himself
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Petitioner,

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et al.,

Respondents.

No. 454

ANDREW W. COMSTOCK,

Petitioner,

v.

GUY A. THOMPSON, Trustee of New Orleans, Texas and
Mexico Railway Company, Debtor, *et al.*,

Respondents.

MOTION TO DISMISS APPEALS

PLEASE TAKE NOTICE that the undersigned will move this Court on March 8th, 1948 at the Courthouse thereof upon the opening of argument of these appeals for an order dismissing said appeals pursuant to Rule 7 of the Rules of this Court, on the following grounds:

1. That Andrew Comstock, petitioner, a bondholder of Missouri Pacific R. R. Co. has no legal capacity to appeal "on behalf of himself and others" alleged holders of 5¼% Secured Serial Gold bonds; (Appeal No. 451), nor in behalf of NOTM (Appeal No. 452).

2. That Andrew Comstock, petitioner, has no legal standing or right to appeal in the name of Guy A. Thompson as Trustee of NOTM; (Appeal No. 453).

3. That Andrew Comstock, petitioner, is not an aggrieved party (Appeal No. 454).

In support of said motion, the annexed statement will be submitted to the Court.

Dated, New York, N. Y., February 28, 1948.

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To:

CLERK, U. S. SUPREME COURT,
Washington, D. C.

WILLIAM H. BIGGS,
Attorney for Petitioners,
Security Building,
St. Louis 2, Missouri.

Statement in Support of Motion to Dismiss Appeals

This statement is submitted to this honorable Court in support of the motion by Convertible Bondholders Group, Respondents, to dismiss these appeals pursuant to Rule 7 of the Rules of this Court.

The four self-serving captions of these appeals (Nos. 451, 452, 453, and 454) used or adopted herein by counsel for petitioners do not *ipso facto* adjudge Comstock's right to use these imposing titles.

As to Appeals Nos. 451 and 452

As to appeals taken by the petitioner, Andrew Comstock allegedly "on behalf of himself and others holding upwards of \$900,000. principal amount of said (5¼%) bonds" (Appeal No. 451).

The petitioner has no right to represent any group of persons in this proceeding or upon this appeal except pursuant to subsection (p) of Section 77 of the Bankruptcy Act after permission is granted by the I. C. C.

Permission to intervene personally in the reorganization proceeding was granted to petitioner Andrew Comstock by the I. C. C. but denied as to "others holding upwards of \$900,000. principal amount of said (5¼%) bonds".

Furthermore the petitioner Andrew Comstock has been given no authority by law, or by the District Court, and he, therefore, has no right, to appeal in the self-styled caption used in Appeal No. 451.

Petitioner has also brought an appeal (No. 452) in the name of NOTM. Petitioner is an alleged creditor of MOP, and he or the "others" have presumably accepted interest on the 5¼% bonds from MOP since the issuance of said bonds and ratified and approved

4

MOP's alleged management of NOTM. He is, if anything, a creditor of MOP and not of NOTM. Hence he has no standing in Court to sue in the name of NOTM.

These appeals should be dismissed.

As to Appeal No. 453

As to appeals taken by petitioner, Andrew W. Comstock allegedly on behalf of Guy A. Thompson, Trustee of NOTM.

In this self-styled caption, as well as in Appeals Nos. 451 and 452, petitioner Comstock asserts he represents holders of MOP's 5¼% Secured Serial Gold Bonds.

As pointed out above, petitioner Comstock has no legal capacity to appeal in behalf of NOTM or on behalf of other holders of MOP's 5¼% Secured Serial Gold Bonds.

The I. C. C. denied Comstock the right which he appropriated to represent other holders of 5¼% Secured Serial Gold Bonds and no appeal from the adverse ruling and order of the I. C. C. has been taken to the District Court or to the United States Circuit Court of Appeals, and the time to do so has expired.

Petitioner by the same token has no authority in law, from the District Court, or from the Trustee, Guy A. Thompson, to adopt the title used in this appeal, and he, therefore, has no right to appeal on behalf of "Guy A. Thompson, Trustee of the NOTM".

Moreover, there never was any question about the propriety of Guy A. Thompson acting as Trustee of NOTM and MOP. He was appointed as such Trustee by an order of the District Court from which no appeal was taken by petitioners. The order of his appoint-

ment has not been rescinded, nor was Mr. Thompson requested by bona fide NOTM creditors or stockholders to resign from NOTM trusteeship because of prejudice or inconsistent or divergent interests. The claims alleged by Comstock are simply matters of bookkeeping, accounting and administration of the MOP properties, in which Comstock has no interest as a matter of law.

Regardless of Comstock's designation of the title of these appeals, he represents only himself (See R. IV, p. 31).

The Trustee of MOP however, represents all creditors.

In re Lewensohn (C. C. A. 2d Circ.), 121 Fed. R. 538, certiorari denied 189 U. S. 513, at page 539 of the Reporter, the Court said:

"The trustee represents every creditor. The orderly conduct of the administration requires that a proceeding for the re-examination of the claim should be taken in the interests of all the creditors and not be permitted at the instance of any one creditor unless demanded by the interests of all. If the trustee should, without sufficient reason, refuse to proceed, the Court, by its order, could compel him to do so or remove him for disobedience."

The Court said further on page 540:

"We cannot believe it was within its intention (referring to general order 21 Cl. 6, 32 C. C. A. XXIII, 89 Fed. X) to permit the trustee and creditors concurrently to pursue a re-examination of a claim, or to permit a creditor to do so when the trustee, for sufficient reason, does not approve, or when, in the interests of all it is desirable that the trustee should conduct the proceeding."

To the same effect and citing many authorities is *Maryland Casualty Co. v. Freeman*, 71 Fed. (2d) 1011.

In the case of *Fred Reuping Leather Co. v. Fort Greene Nat. Bank of Brooklyn*, N. Y.; *In re Honesdale Union Stamp Shoe Co., Inc.*, Circuit Court of Appeals, 3d Circuit (1939), 102 Fed. (2d) 372, at page 372, the Circuit Court said:

"* * * the trustee represents all the creditors and may therefore be relied upon to press all proper objections to the claims of those whose standing is questionable. If he defaults in his duty the court may upon application direct him in his duty or, if he be recalcitrant, remove him for disobedience, or permit a creditor to act in his name. To allow any creditor, without such leave, to institute proceedings to reject the claims of other creditors, will not, as Judge Wallace pointed out in *Re Lewensohn*, supra, 121 F. 539, 'subserve any necessary purpose, and open the door to grave abuse. It enables one creditor at his own pleasure to subject any one of the other creditors, or all the other creditors, to the inconvenience and expense of unnecessary litigation, and to unduly protract the settlement of the estate. It is not allowed, in terms, by any provision of the bankrupt act.' 'Furthermore', as Judge Thayer said in *Chatfield v. O'Dwyer*, supra, 101 F. page 709, '*if one creditor of a bankrupt may prosecute an appeal under section 25 of the bankrupt law (11 U. S. C. A. par. 48), from the allowance of a claim, then any other creditor may take a like appeal upon the same or different grounds, and this court may be required to entertain a number of appeals, all of which are brought to test the validity of the same demand*.'" (Italics ours.)

These are the same cases relied on by Comstock in the District Court (D. C. Brief, pp. 65-66).

It follows that the order of the District Court and of the United States Circuit Court of Appeals, 8th Circuit, was right.

Petitioner Comstock has no legal standing or right to appeal in the name of Guy A. Thompson as Trustee of NOTM. To hold otherwise is to license every creditor in this proceeding to test the validity of any claim real or imaginary before the reorganization Court. No plan of reorganization could ever be concluded in such event. The Trustee alone represents all creditors.

These appeals must, therefore, be dismissed.

As to Appeal No. 454

As to appeal taken by the petitioner Andrew W. Comstock in his own name.

Comstock's appeal in his own name as a creditor holding 5¼% Secured Serial Bonds of MOP, the principal debtor, has no superior standing to that of any other 5¼% Secured Serial bondholder and his claim cannot be singled out from those claims, if any, which other 5¼% bondholders have as a class.

Comstock may speak only for himself on this appeal. But to do so he must show that he is a bona fide bondholder of said bonds in due course, before maturity and for value and without knowledge of any infirmity in the Secured Serial bonds. This he cannot demonstrate. On the contrary, it has been established that he was aware of the infirmities, if any, which he alleges are inherent in this bond issue and nevertheless purchased these bonds in 1940 after default in the payment of interest thereon (See R. IV, p. 20).

Petitioner Comstock does not claim he purchased these bonds before default in the payment of interest thereon, for were he to do so, he would be bound to a ratification

of all the acts of overreaching claimed to have been perpetrated by MOP, since the funds so obtained by MOP were concededly used for the specific purpose of meeting MOP's system obligations and dividends.

This honorable Court should not take jurisdiction it is respectfully submitted, to hear petitioner Comstock, on an individual complaint, i. e., his Objections "Numbered 19 and related objections" to the 1940 approved plan of reorganization, on an intercompany claim because the same is now moot. There is no approved plan of reorganization and this objection may never again arise if for one reason or another a final plan of reorganization is not adopted, or if as is claimed by this petitioner NOTM is declared to be solvent.

Therefore, this petitioner is not now an aggrieved party as there is no final determination or adjudication of the treatment of his bonds by an adopted or approved plan of reorganization.

Moreover, should this honorable Court set the precedent of permitting an individual bondholder of a principal Debtor to appeal from an interlocutory order of the District Court or of the I. C. C., other bondholders and claimants may swamp the Courts with other demands to test the validity of their particular claims upon intercompany matters.

Finally, there is not a scintilla of evidence in the record by Comstock to show that he is a bona fide bondholder or that he has suffered any damages as a result of his purchase of MOP 5¼% serial bonds.

The contrary is the admitted fact as the record will disclose. Comstock became a bondholder of MOP in 1940, years after the commencement of this proceeding in 1933 by buying bonds at ten cents on the dollar (R. IV p. 20).

These bonds have since been selling in the open market at or close to par. They are now selling for far more than Comstock paid for them.

The several appeals taken by Comstock must therefore be dismissed.

Dated, February 28, 1948.

Respectfully submitted,

HARRY KIRSHBAUM,
Counsel for Convertible Bondholders
Group, Respondents.

EDWIN J. BEAN,
of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 451-454

No. 451

ANDREW W. COMSTOCK, a holder of Missouri Pacific Railroad Company
5¼% Secured Serial Gold Bonds, on behalf of himself and others holding
upward of \$900,000 principal amount of said bonds,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS, holding First and Refund-
ing Mortgage 5% Gold Bonds of Missouri Pacific Railroad Company,
et al.,

Respondents.

No. 452

NEW ORLEANS, TEXAS AND MEXICO RAILWAY COMPANY,
Debtor, by ANDREW W. COMSTOCK, representing himself and
others, etc.,

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GROUP OF INSTITUTIONAL INVESTORS, holding First and Refund-
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No. 453

GUY A. THOMPSON, Trustee of the New Orleans, Texas and Mexico
Railway Company, by ANDREW W. COMSTOCK, representing himself
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et al.,

Respondents.

No. 454

ANDREW W. COMSTOCK,

Petitioner,

v.

GUY A. THOMPSON, Trustee of New Orleans, Texas and
Mexico Railway Company, Debtor, *et al.*,

Respondents.

**BRIEF OF CONVERTIBLE BONDHOLDERS,
RESPONDENTS**

Introductory Statement

This brief is filed with this Court on behalf of the Convertible Bondholders Group, Respondents, constituting 21 individual owners and holders of the 5½% Convertible Gold Bonds of the principal Debtor, Missouri Pacific Railroad Company, parties and the original representatives of this class of security to participate in this proceeding. Authority to intervene was given by order of the L. C. C. pursuant to subsection (p) of Section 77 of the Bankruptcy Act.

The 5½% Convertible Gold Bonds hereinafter referred to as Convertible bonds, constitute a \$45,493,000 issue of the principal Debtor sold to the public in May 1929 and secured by the entire equity of the principal Debtor, MOP.

As of January 1, 1948, these bonds with accrued and unpaid interest represented a claim against the Debtor estate of \$83,441,744, the second largest creditor claim in this proceeding.

The Convertible Bondholders Group, Respondents, have no other security interests in this proceeding and own no other securities of the principal Debtor.

Comstock, petitioner* herein, holds some MOP 5½% serial bonds and hence represents only himself, in this proceeding, as we have shown in the forepart of this brief in the Statement in Support of Motion to Dismiss these Appeals *supra*, pages 3 to 9. He is nevertheless endeavoring by this appeal to subordinate the MOP claims against NOTM properties to the entire \$13,156,000 issue of 5½% serial bonds.

NOTM Mortgage and Income Bondholders Committee are respondents herein. Insofar as the Institutional Group

* Petitioner Comstock claims to be the holder of \$80,000 principal amount of such bonds (Petitioner's brief, p. 2, footnote).

of First and Refunding Bondholders of MOP are concerned, they are also respondents herein. It is clear that their interest is in behalf of consummating a plan of reorganization without injury to their priority. Convertible Bondholders Group, respondents herein, generally support the views of the Institutional Group of First and Refunding Bondholders, respondents herein, upon this appeal and as set forth in the Motion to Dismiss. Respondents maintain that Comstock's objections,* if valid, must be subordinated to the Convertible Bondholders' claims.

At no time have the Convertible Bondholders Group, respondents, had any connection with the management of MOP, the principal Debtor or any subsidiary thereof. It is important to call this fact to the attention of this Court for the treatment to be accorded to the bona fide Convertible Bondholder's claims under any approved plan of reorganization may be innocently but materially affected by a reversal of the order appealed from.

As the original and only independent representative Group of Convertible Bondholders in this proceeding directly concerned, a reply to the Comstock brief is therefore here independently required to be made on behalf of the Convertible Bondholders, respondents herein, to the end that the orders of the District Court and of the United States Circuit Court of Appeals 8th Circuit be affirmed.

* The designation "Comstock claims" or "Comstock objectants", etc., refers to petitioners herein.

Jurisdiction

Jurisdiction of this Court is invoked by petitioners under Section 240 (a) of the Judicial Code, as amended, but it is respectfully submitted by these respondents that jurisdiction of this honorable Court is lacking.

The date of the unanimous opinion, order and judgment of the United States Circuit Court of Appeals for the Eighth Circuit affirming the order and judgment of the District Court was August 28, 1947. Petition for certiorari was granted by this Court on January 12, 1948.

Opinions Below

The opinion of the District Court is reported in 64 F. Supp. 64. The opinion of the U. S. Circuit Court of Appeals for the Eighth Circuit unanimously affirming the order and decree of the District Court is reported in 163 F. (2d) 350; also see R. IV pp. 13-27.

Statement of the Case

The principal Debtor, MOP, acquired the controlling interest in the capital stock of the New Orleans, Texas and Mexico Railway Company, NOTM, at the end of 1924 and at the times relevant here owned from 58 to 93 percent of the total \$15,000,000 par value of such stock and from January 1925 until simultaneous commencement of reorganization proceedings in bankruptcy of both corporations in 1933, the affairs of MOP and NOTM were managed by the same officers. See transcript of proceedings in the U. S. Circuit Court of Appeals for the Eighth Circuit Volume IV page 15 referred to herein as "R. IV p. ".

It appears that thereafter and in 1926, MOP issued and caused to be sold to the public the 5¼% Secured Serial

Bonds in the amount of \$13,156,000 of the kind allegedly held by petitioner Comstock. The security behind the 5¼% Serial Bonds is the pledge of the capital stock of NOTM in the same face amount as the face amount of such bonds, (R. IV p. 17). Appellant was not at that time or since, a holder or owner of NOTM stock.

On May 1, 1929, MOP issued and caused to be sold to the public the 5½% Convertible Gold Bonds Series A, in the amount of \$46,392,000 to become due on May 1, 1949 of the kind held by Convertible Bondholders Group, Respondents herein. \$45,493,000 in amount of said bonds were issued and are outstanding in the hands of the public. These Convertible bonds are a direct obligation of MOP. However, the Convertible bonds were issued by MOP to pay off \$30,551,000 outstanding St. Louis, Iron Mountain and Southern Railway Company River & Gulf Divisions unifying and refunding mortgage 4% Gold Bonds which matured July 1, 1929 and to reimburse the treasury for capital expenditures theretofore made. (Report of Bureau of Valuation of I. C. C. filed by direction of I. C. C. Division 4, pursuant to order of the Commission entered January 19, 1948 and paragraph 11, of subsection (c) of Section 77 of the Bankruptcy Act of the United States, as amended, and forming part of the record before this Court pursuant to said order and the provisions of law). The security behind the Convertible Bonds in this proceeding if equitably considered is therefore definitely a superior and prior lien to that of the 5¼% Secured Serial Bonds. The 5½% Convertible Gold Bonds are also the direct obligation of MOP and hence are necessarily secured not by the capital stock of any *subsidiary* but by all the capital stock of the *principal* debtor MOP.

Petitioner Comstock who became a MOP bondholder after 1936 filed his objections to the then approved (1940) plan of reorganization for the principal Debtor MOP for the first time on November 22, 1944. The objection was to the allowance on August 28, 1933 of a MOP claim against

the NOTM properties in the amount of \$10,565,226.78. Certain of his objections in support of disallowing said MOP claim contained charges of mismanagement of the Missouri Pacific to his detriment as a creditor of MOP, but the separately numbered objections related to wrongs which he alleges were done by the Missouri Pacific to NOTM to the detriment of his interest in the stock of the subsidiary NOTM (R. IV p. 17). In 1935, the MOP claim was upon request re-examined and approved by the District Court.

The Nature of Comstock Objection No. 19 and Related Objections

At this point, it is pertinent to remind this Court that the order of the reorganization Court approving the 1940 plan of reorganization was reversed by the order of the U. S. Circuit Court of Appeals, 8th Circuit, by order made and entered September 9, 1947 and the proceeding to formulate a new plan of reorganization or to revise the 1940 plan of reorganization was, for reasons appearing in said order (*not* including Comstock's objections to the plan No. 19 and related objections) referred back to the I. C. C. which has set public hearings to formulate and adopt a new or revised plan of reorganization for MOP. Comstock's attorneys consented in open Court to the making and entry of said order. Hearings on a plan are now scheduled for March 23rd 1948.

Hence Comstock's objections to the old plan "Numbered 19 and related objections" which are urged here on appeal have become and now are academic and moot.

When and if a new plan is adopted, petitioner Comstock, may find his objections have been obviated, for if all the creditors' claims of MOP of principal and interest are fully compensated under a new plan of reorganization, Comstock surely can have no complaint. Much of MOP's bonded

indebtedness has been paid off and a considerable amount is current.* At present as the proceeding now stands Comstock cannot claim to be an objectant or an aggrieved creditor.

Comstock's objection "Numbered 19 and related objections" charged that during the period when the affairs of

* Since the issuance by the Commission of its last report and order, the District Court has authorized other cash payments on the principal of certain obligations of the Debtor. These may be tabulated thus:

<i>Claims Paid</i>	<i>Amount of Claim Paid</i>
R. F. C. claim	\$23,134,800.
Bank Debt	5,850,000.
R. C. C. claim	2,487,000.
St. Louis, Iron Mountain and Southern Railway Company, River & Gulf bonds	13,803,200.
Secured serial 5¼% bonds	895,000.
Boonville, St. Louis & Southern bonds	210,500.
NOTM 5% income bonds	2,354,000.
Total	\$48,734,500.

Besides the foregoing, the District Court also authorized and the Trustee has paid off \$19,093,665 in interest on three bond issues:

\$11,159,525 on MOP first and refunding bonds for the Sept. 1, 1939 and March 1, 1940 coupons,

6,324,140 on first mortgage and NOTM income bonds, for the period to October 1, 1947,

1,610,000 on first mortgage bonds of the International Great Northern RR (IGN) for the year 1939 to 1940.

\$19,093,665 total.

"Extensive expenditures have also been made for improvement of the property * * * these problems arising out of the substantial changes in conditions since the approval of the plan justify its further review * * * the Commission is of opinion that the present plan should be returned to it for reconsideration and revision, and it so recommends." Quoted from I. C. C. brief, filed in the U. S. Circuit Court of Appeals, 8th Circuit, about August 28, 1947. On September 9, 1947, the Circuit Court entered an order vacating the District Court order approving the plan and referred the matter back to the I. C. C. Hearings are now scheduled for March 23, 1948, to adopt a plan of reorganization.

NOTM were controlled by MOP, that is between the end of 1924 and the bankruptcy in 1933, the Missouri Pacific management caused its subsidiary NOTM to pay to it dividends illegally out of capital and to improvidently declare and pay dividends unjustified by the business and conditions of NOTM (R. IV pp. 17-18).

A \$200,000,000 expansion program was carried on by MOP for its properties including its NOTM properties (R. IV, p. 26). \$10,355,226.78 of advances made by MOP for NOTM developments remained unpaid and thus NOTM notes in the sum of \$9,955,226.78 evidencing the advances were credited to MOP.

At the time of the commencement of this proceeding the notes evidencing advances to NOTM for such purposes aggregated \$10,355,226.78. This indebtedness was reported to the I. C. C. and deemed valid by it. Under authorization of the I. C. C. granted after hearing, MOP pledged two of the notes aggregating \$9,955,226.78 as security for loans made to it by the Reconstruction Finance Corporation. An additional pledge was made to Railroad Credit Corporation (R. IV, p. 16). The RFC and RCC claims have since been paid from earnings of the entire Debtor's estate, without objection from Comstock, and the order authorizing payment by the Trustee subrogated the First and Refunding Mortgage bondholders and other MOP creditors including 5¼% Serial bonds held by Comstock, to the extent of their interest (R. 1188, Ex. 335-357), to the lien of the RFC and the RCC on the pledged collateral, including the pledged portion of the intercompany claim (R. 1157 and 1165).

Thus a determination in favor of Comstock, by this honorable Court of the questions presented will not result in a reversal of the order, overruling petitioner Comstock's Objection 19, since petitioner Comstock concedes that the RFC and RCC collateral notes of \$9,955,226.78 of the total \$10,355,226.78 in these inter-company claims which have been satisfied of record, are valid. (R. 382-386, 334.) If

\$9,995,226.78 of the \$10,355,226.78 in said notes are valid, then the balance of said notes given as part of said inter-company claims must also be conceded as valid.

The attention of this honorable Court is called to the fact that "the items which made up the total \$10,565,226.78 were clearly specified and evidence of the validity of the debt as consideration for the notes were adduced before the Commission at an early stage of these Section 77 proceedings, and the obligation was deemed to be valid and ahead of New Orleans' (NOTM) stockholders interest in all of the accountings, computations and adjustments resulting in the plan of reorganization determined by the Commission and approved by the Court in 1940" (R. IV, pp. 16-17).

Facts Regarding Comstock's Claims

Petitioner Comstock owns some of said 5¼% Serial bonds. From the testimony given before the District Court, it clearly appears that as to the case presented on the objections to the old approved plan of reorganization, Comstock had, after the report of the Senate subcommittee which criticized the MOP management of NOTM and in 1940 (7 years after the commencement of these proceedings) bought these MOP bonds at about 10 cents on the dollar and then employed an accountant to make studies of the accounts, records and reports of MOP management of the NOTM properties with a view toward bolstering a law suit. Comstock's charges are based entirely on his accountant's interpretation of MOP's figures (See R. IV, p. 20). These studies were not designed to reflect the system character of all the Gulf Coast Lines held under MOP ownership but rather to develop NOTM as a completely independent unit, neither asking nor requiring to give financial or other support for the benefit of the entire MOP System.

The alleged "mismanagement" of NOTM, if any, took place from 1925 to 1933 and hence the claimant Comstock

under any circumstances was guilty of laches in presenting his objection. Furthermore, Comstock's champertous conduct in buying into a lawsuit should not commend itself to this Court of equity. The object of such litigation can only be to delay final reorganization of the Debtor.

The testimony on behalf of respondents was supported by many accountants and summarizing exhibits all to the effect that MOP management of NOTM properties was honest and was beneficial to NOTM.

It is respectfully submitted that notwithstanding such proofs respondents were not required to show benefits accruing to NOTM, since an identical set of officers managed MOP and NOTM and other branch lines of MOP. The important question was whether MOP as a railroad system, and overall operating company benefited and not whether *each* of its subsidiaries or *each* branch line prospered. In this connection, the attention of this honorable Court is called to the fact that the petitioner Comstock "did not assert or tender evidence to show that any specified individuals working for NOTM or MOP or both companies has misappropriated or wrongfully diverted to their own use any of the assets or business of the NOTM to the detriment of stockholders. He tendered no evidence to show that the plan of MOP System expansion, including expansion and improvement of the New Orleans (NOTM) and for the financing thereof, adopted and carried through by the Missouri Pacific (MOP), was in itself fraudulent or reckless and improvident" (R. IV, pp. 19-20).

District Court's Findings and Findings by the Circuit Court of Appeals

The District Judge heard testimony on Comstock's objection to the plan of reorganization for two weeks. His questions, comments and directions reflect his close attention to and understanding of the testimony and its application through the trial. His written opinion is reported in

64 F. Supp. 64. His findings of fact and conclusions of law were drawn with care and thoroughness, and are responsive to all the issues presented by the objections. No claim is made of any refusal on the part of the court to make findings in respect to any other issues claimed to have been presented.

That MOP drew on the NOTM properties and financed the same may be conceded. That is the reason MOP as previously constituted, purchased or acquired control of NOTM, viz., for the enlargement and unification of the present MOP System. We respectfully submit that there was no illegality in this.

The disputes and conflicts of testimony in respect to the allowance of the MOP claim as reflected by the accounts and the inferences to be drawn were all issues of fact. The findings unanimously sustained by the United States Circuit Court of Appeals, 8th Circuit cover many printed pages of the record and to discuss them in connection with the contrary inferences which petitioner contends should be drawn from particulars of evidence would serve no useful purpose. MOP's \$200,000,000 expansion and improvement program and the accounting system that was used and by which the directors were kept informed for management purposes (which accounting system was under I. C. C. supervision) and the whole course of the management of NOTM is revealed in the evidence. There was no desire or intent on the part of MOP's Trustee or the present operating officers to conceal or withhold any information.

The findings indicate the opposing contentions made on the trial and cover the particulars of the evidence and indicate the bases of the court's action.

The Circuit Court of Appeals 8th Circuit, carefully considered the record in the District Court and in a well reasoned opinion declared that it too was satisfied from its examination thereof that the findings of the trial court were not erroneous and that on the facts as found the claim of MOP was properly allowed and the petitioner's

objections and claims for special treatment were properly denied (R. IV, pp. 14-27).

Petitioner Comstock has suffered no damage. On the contrary he has a handsome profit on his speculation.

Therefore what purpose he has in prosecuting this appeal is not clear, unless it is to endeavor to place himself in a bargaining position so he can unnecessarily protract this proceeding to reorganize MOP. However, a reading of the opinions of both Courts will demonstrate that Comstock received the benefit of the kind of judicial decision to which he was entitled—an application of the law to the facts of the case. Fairness and justice do not require more than this.

The judgments of the courts below should be affirmed.

ARGUMENT

Summary of Points of Fact

The salient facts concerning the objections which are the subject of this appeal, filed in the District Court by Comstock, to the last plan of reorganization, which facts are not disputed, are as follows:

1. There is no approved plan of reorganization for MOP at the present time.
2. The facts as to "domination" of NOTM by MOP as claimed by petitioner Comstock took place in 1924. The claim as to domination ignores the fact that MOP is an integrated railroad system of which NOTM is a part; officers for NOTM and MOP until bankruptcy, were the same; the Trustee is the same. NOTM shared in a \$200,000,000 expansion and improvement program designed to benefit the entire MOP System.
3. Comstock bought a few of MOP 5¼% serial bonds in 1940 but waited until November 22, 1944 before present-

ing his objections to the then approved plan of reorganization. Comstock admittedly paid about 10 cents on the dollar for these bonds. He cannot show that he has been damaged in his speculation. Comstock owns no stock in NOTM.

4. There is no illegality claimed or shown in MOP's acquisition of the NOTM properties. Petitioners are not minority or dissenting NOTM stockholders of that transaction. Even if petitioners were bona fide bondholders of MOP following acquisition of the NOTM properties, they must be deemed to have ratified MOP's management, control, etc. of NOTM's properties.

5. The I. C. C. has declared valid a loan transaction with the R. F. C. and the R. C. C. whereby MOP pledged as collateral \$9,955,226.78 of its \$10,355,226.78 claim against the NOTM properties. Hence the claim has been adjudicated valid.

6. Convertible Bonds represented by the undersigned respondents are secured by the entire equity of MOP necessarily including equities of all subsidiary properties. The MOP 5¼% serial bonds held by Comstock are secured only by a pledge of NOTM stock.

7. Convertible Bondholders Group, respondents herein are *bona fide* bondholders and are not allied in interest with any persons who composed the management of MOP, and who may have (if indeed anyone has) benefited from the NOTM transactions. Convertible Bondholders Group, Respondents have a right to assume that all subsidiary property of MOP will be used for the benefit of MOP creditors.

8. The interpretation of the accounting practices of MOP as made by Comstock is in disregard of the best interests of System operation of MOP and the benefits accruing to MOP as a whole and contrary to the rules prescribed by the I. C. C.

SUMMARY OF POINTS OF LAW

Point I

The District Court and the United States Circuit Court of Appeals Were Justified in Overruling Petitioners' Contentions. It is not the Practice of this Court to Try Any Case de Novo.

Point II

Petitioner Comstock, as Owner of Secured Serial 5¼% bonds of MOP the principal Debtor, cannot now be heard to complain because the results of MOP's management of its NOTM properties were not profitable.

Point III

Even if Petitioners Were in Position of NOTM stockholders, they Could not Be Heard to Complain against Respondents.

Point IV

If the facts alleged by Comstock are found by this Court to warrant equitable redress, the Convertible Bondholders Group, respondents, are nevertheless entitled to have the benefit of the allowance of the said claim of \$10,565,226.78 plus interest. Petitioner's claim or dispute is with Alleghany Corporation only.

Point V

Comstock's objections were properly overruled as against the Convertible Bondholders Group on other grounds.

Point VI

Taylor v. Standard Gas Co., 306 U. S. 307, principally relied on by petitioners is clearly distinguishable and inapplicable to the case at bar.

POINT I

The District Court and the United States Circuit Court of Appeals were justified in overruling petitioners' contentions. It is not the practice of this Court to try any case *de novo*.

Putting aside for the moment the stubborn fact that the Comstock objectants took no steps for more than 11 years to invalidate the proof of claim which was filed and allowed by the Trustee on August 28, 1933 against NOTM properties in the amount of \$10,565,226.78 and later re-examined by the Trustee and allowed in 1935, the District Court was justified in refusing to accept Comstock's 1946 version of the MOP claim.

Comstock's objections against allowance of the MOP claim can relate only to the treatment which he ultimately receives under an approved plan as holder of MOP 5¼% serial bonds. The objections which petitioners assert, however, are against the treatment which NOTM minority stockholders received under the old plan as a result of the allowance of said MOP claim. In so doing, these petitioners' claims are not only premature and lacking in legal authority (Comstock owns no NOTM stock), they are inconsistent as well. The two matters are entirely unrelated; the two positions they assume are contradictory. The treatment of an NOTM stockholder under an adopted plan of reorganization will be necessarily different from that accorded a MOP 5¼% serial bondholder.

The Trustee for the entire MOP System is best qualified and is required by law to determine the merits of Comstock's and any other asserted claims or objections to claims and whether to overrule or to allow them.

Comstock challenged the validity of the proof of claim filed and allowed against the NOTM properties by the

Trustee for the principal debtor MOP. He claims that the MOP Trustee, being also Trustee of NOTM, could not give NOTM the "vigilant protection of an independent Trustee". Comstock asked the District Court to again re-examine the claim and that it be disallowed.

To argue thus, Comstock petitioners overlook the fact that they are MOP bondholders and not NOTM bondholders. Secondly, as such MOP bondholders, these objectants must consider the System nature of their obligation and not the individual properties which make up the MOP System.

Furthermore, it was affirmatively established before the District Court by Guy A. Thompson, the Trustee for MOP, that said objectants knew the merits or demerits of the MOP claim against NOTM as long ago as 1935 and were then given an opportunity to contest said claim, yet they made no objection thereto and took no appeal from the Court order allowing the same.

The allowance of the claim in 1933 and again in 1935 made it a *fait accompli*, and it is grossly unfair to public investors in MOP securities in the light of the merits of the claim to require such a reversal on the part of the Trustee or the Courts as will result in depriving them of substantial property rights which would result if any decision should now be made re-examining said claim in accordance with petitioners' proposed bookkeeping methods, and adversely determining the same.

There never was any question about the propriety of Guy A. Thompson acting as Trustee of MOP and NOTM properties. He was appointed as such following the identical officer management for MOP and NOTM prior to 1933. He was appointed as such Trustee by an order of the District Court from which no appeal was taken by these petitioners. The order of his appointment has not been rescinded, nor was Mr. Thompson requested by *bona fide*

NOTM creditors or stockholders to resign from NOTM trusteeship because of inconsistent or divergent interests.

The claims alleged by Comstock are simply matters of accounting and administration by MOP of its subsidiary properties. Comstock's interpretation of MOP's accounting methods and his characterizations simply ignore the MOP accounting system (prescribed by the I. C. C.) and exaggerates and distorts the importance of NOTM properties in a unified system.

The Trustee of the principal Debtor MOP represents all creditors.

It was so held in *In re Lewensohn, supra* (C. C. A. 2d Circ.) 121 Fed. R. 538, 539, 540 cert. denied 189 U. S. 513.

Also in *Maryland Casualty Co. v. Freeman*, 71 Fed. (2d) 1011, *supra*, citing many authorities.

Also please see *Fred Reuping Leather Co. v. Fort Greene Nat. Bank of Brooklyn, N. Y., In re Honesdale Union Stamp Shoe Co., Inc.* (C. C. A. 3d Circ.) (1939), 102 Fed. (2d) 372, *supra*.

Despite the legal and the factual situation obviating any need therefor, a hearing on Comstock's Objection No. 19 and related objections to MOP's claim, before the District Court, was nevertheless allowed. It lasted two weeks. The District Judge in charge of this proceeding heard the testimony, etc. and made findings of fact and conclusions of law "drawn with care and thoroughness" (R. IV, p. 23) and "responsive to all the issues presented by the objections here involved and the evidence that was adduced." The District Court overruled the petitioners' contentions.

The vast extent of the railroad business carried on by the MOP during the long past period of alleged mismanagement and the intricate corporate structures of the MOP system of railroads inevitably presented most seri-

ous problems in the attempts of accountants to picture what their course of operations and financial transactions had been (R. IV, p. 23).

The NOTM properties had in some respects the character of a holding company in that it operated itself only a small fraction (around 11%) of the railroad mileage of its railroad system, but owned the stocks and securities of some 14 other railroad companies in the same area.

For financing purposes, the individual roads comprising the NOTM group were dependent upon NOTM which acted for the group in respect to financing, and presented the necessary unitary functioning principal.

It was for the District Court to draw the inferences from the conflict in testimony with regard to the true financial condition of NOTM at different times within the period and to establish and present the financial results of the railroad operations that were carried on. It was through the use of the consolidated balance sheets that NOTM properties were treated as a unit in the financing of the companies through MOP management. Petitioner before the District Court insisted upon a "break down of the figures" to the smallest branch line of the NOTM properties to support his version of the figures that the finances of said branch line had been mismanaged.

But the disputes and conflicts of testimony and documents in respect to the accounts and the inferences to be drawn therefrom were all issues of fact. From the order of the District Court overruling Comstock's objections, petitioners took an appeal to the U. S. Circuit Court of Appeals, 8th Circuit.

The Circuit Court of Appeals was satisfied, however, from their examination of the voluminous record that the findings of the trial court were not erroneous and that on the facts as found the claim of MOP was properly allowed

and the objections and claim for special treatment asserted by Comstock were properly overruled and the order appealed from was unanimously affirmed.

Petitioners here again have stated the case in substantial disregard of the findings of the trial court and practically as though the case was here to be tried by this Court *de novo* on the evidence submitted.

This Court must decline to assume that function. This honorable Court may not and should not set aside the findings of fact which have been made by the trial court and confirmed by the U. S. Circuit Court of Appeals.

Allen v. Trust, 326 U. S. 630, 636;

U. S. v. O'Donnell, 303 U. S. 501, 508;

Goodyear Co. v. Ray-O-Vac. Co., 321 U. S. 275, 278;

General Orders in Bankruptcy Nos. 36 and 49 (11 U. S. C A 53 post.);

First Nat'l v. Littlefield, 226 U. S. 110, 112.

The findings thus sustained by the United States Circuit Court of Appeals cover many printed pages of the record, and to discuss them in connection with the contrary inferences which these petitioners contend should be drawn from particulars of evidence would serve no useful purpose (R. IV, p. 26). Petitioners' objections do not aid in completing the reorganization of the MOP System which is the subject of this proceeding.

The judgment of the Trustee, of the District Court and of the United States Circuit Court of Appeals, 8th Circuit was right. The judgment and order appealed from should be affirmed.

POINT II

Petitioner Comstock, as owner of secured serial 5¼% bonds of MOP, the principal debtor, cannot now be heard to complain because the results of MOP's management of its NOTM properties were not profitable.

The purposes for which MOP issued the serial 5¼% bonds cannot be traced directly and exclusively to the purchase by MOP of NOTM stock. In other words, it is not the claim of Comstock that he was an original owner of NOTM stock and that he was induced to exchange the same dollar for dollar for MOP 5¼% serial bonds. Comstock does not profess to be a minority stockholder of NOTM. Comstock does not claim any fraud in the transaction whereby he became a MOP 5¼% bondholder.

There is no privity of contract between NOTM stockholders and the petitioner Comstock or with any other 5¼% serial bondholder. Comstock was never a holder of NOTM stock. The transaction (i. e. pledge of NOTM stock to purchasers of MOP serial 5¼% bonds) was not shown to be unprofitable for such bondholders at the time when such bonds were received. Nor did these petitioners or any other holder of 5¼% serial bonds at any time thereafter disaffirm their transaction upon learning of the alleged malfeasance of MOP either at the commencement of the reorganization proceedings or after the report of the U. S. Senate subcommittee.

The above statement is made not in defense of wrongdoing, if any took place, but rather to demonstrate to this honorable Court that these petitioners in any view of their complaint, are not before this Court with clean hands and that they have slept on their rights so long that an abnegation of MOP's claims at this late date will adversely affect the interests of innocent and bona fide

holders of the 5½% Convertible bonds which were sold to the public in the sum of \$45,493,000 after May 1, 1929.

The matters about which Comstock complains, took place in 1924.

Since then MOP bond issues have been sold to the public with the approval of the I. C. C. MOP's credit has thereby been pledged to bona fide purchasers of MOP bonds who purchased same before maturity and without knowledge of any alleged infirmities. These persons, members of the public, have vested valid property rights which must not be avoided at this late date.

Therefore, even if all the facts stated by Comstock were true (which we deny), it would be impossible, not to say unfair, to restore the equities of the parties to their original status for it is impossible to recast NOTM's history and experience so as to even approximate what might be its financial condition at this date, had NOTM been independent of the MOP system.

Moreover, the acceptance by other MOP 5¼% serial bondholders of interest payments on these obligations paid regularly by MOP, on and after December 1, 1926 when these bonds were issued and sold to the public until the commencement of this proceeding, must be deemed a ratification by said bondholders of the System operation of the MOP properties. Having accepted these benefits and the obligation of MOP, they cannot now disavow the diminished or impaired value of their collateral security as a result of the System operation of the MOP properties and, now for the first time, demand that the entire situation be disregarded in the interest of NOTM.

The inequalities or inequities which may have existed for NOTM stockholders from 1924 to 1926 under MOP's domination and control of NOTM properties were cancelled and released in the transaction by which NOTM

stockholders received cash notes or MOP 5¼% serial bonds for their holdings.

Only lien bondholders of NOTM have a right to complain of irregularities or imprudence in the management of their affairs by MOP, for only NOTM creditors have (if the facts regarding NOTM as alleged by petitioners be true) lost the right of recoupment. This is not true, however, of NOTM stockholders who as we have said, upon MOP's purchase of NOTM control, either received cash or notes or 5¼% serial bonds of MOP for their stock. Comstock is not a NOTM creditor, and the NOTM Mortgage and Income Bondholders Committee are respondents on this appeal.

The inducing causes or the statements made upon which Comstock relied in buying 5¼% serial bonds were not established before the District Court. Such evidence was not offered by said petitioner. Yet this would be vital to any claim of fraud or overreaching.

There was no irregularity in the transaction whereby MOP purchased a 93% stock interest in NOTM properties and dominated that railroad. Control of NOTM properties by MOP carried with it the right to operate NOTM for the benefit of the entire system.

Petitioners, therefore, have no legal or equitable right to disavow legal claims against NOTM properties because of MOP's past or present management of said properties for the benefit of the MOP System, since respondents had no part in the management of its properties and such management as existed was also for the benefit of petitioners.

Petitioners' objections are without warrant in fact or law.

The orders of the Courts below should be affirmed.

POINT III

Even if petitioners were in position of NOTM stockholders, they could not be heard to complain against respondents.

Comstock holds no original NOTM stock. But even if the NOTM stock was declared forfeit under the provisions of the indenture, if any, securing the 5¼% serial bonds, the NOTM stockholders have no cause for complaint against other MOP creditors for the management of NOTM properties since MOP creditors, respondents herein, did not share in MOP management.

It should also be noted that:

(a) The matters complained of allegedly took place more than twenty (20) years ago and any complaint based thereon is barred by the Statute of Limitations.

(b) Petitioners are not NOTM minority stockholders.

(c) These petitioners are in a dual conflicting position, on the one hand attacking the transaction whereby MOP allegedly exercised unlawful dominion and control of NOTM properties yet (according to Comstock) accepting dividends declared from NOTM properties, which were used to pay MOP's interest on secured serial 5¼% bonds.

(d) If ownership of NOTM stock is claimed, the date of acquisition of such stock (whether before or after 1924) would be important, for if such stock was purchased after 1926, it was bought presumably with the knowledge that NOTM was part of the MOP system.

(e) Comstock must elect whether he contests the allowance claim as NOTM stockholder or pledgee, or as a MOP bondholder. His present position is inconsistent

and confusing on the matter of treatment of his objections and the assets from which he claims payment.

Since NOTM stockholders, therefore, would have no legal standing, how can Comstock claimants who are MOP bondholders and only pledgees of such stock (and not owners thereof) be heard to dispute any valid claim against NOTM properties?

Appellant's appeal is not brought in good faith.

POINT IV

If the facts alleged by Comstock are found by this Court to warrant equitable redress, the Convertible Bondholders Group, respondents, are nevertheless entitled to have the benefit of the allowance of the said claim of \$10,565,226.78 plus interest. Petitioner's claim or dispute is with Alleghany Corporation only.

Assuming Comstock's argument is correct, which we deny, he does not show how this honorable Court can, at this date, be expected to put him back in status quo? How can this Court be expected to now determine and to separate that part of NOTM earnings which in 1924 and 1933 were considered the subject of prudent management by MOP and that part of earnings which it is now alleged were imprudent?

Aren't MOP minority stockholders and the Convertible Bondholders also victims of any misfeasance or malfeasance in management of MOP as alleged by Comstock?

Petitioner claimed throughout the lengthy hearings before the District Court that Alleghany Corporation as principal MOP stockholder was responsible for the alleged inequities against NOTM.

Assuredly Convertible Bondholders Group, Respondents herein, who purchased these bonds in the open market are

free of any knowledge of wrongdoing by MOP and in no circumstances, are answerable for any irregularities or defalcations brought about by Alleghany Corporation while controlling MOP.

This honorable Court has held that the debtor's securities remain in the custody of the reorganization Court, irrespective of where the property may be located, and that the Court has full jurisdiction over all questions respecting the title to such property.

Gardner v. State of New Jersey (1947), 329 U. S. 565.

Comstock does not claim that Convertible Bondholders Group, respondents, are *particeps criminis* with Alleghany Corporation and hence allowance of this claim cannot be disturbed, but may be set-off or assessed against all Alleghany's security holdings in MOP since 1933.

POINT V

Comstock's objections were properly overruled as against the Convertible Bondholders Group on other grounds.

The Convertible Bondholders Group, Respondents, whose interests have been and are independent of the Alleghany Corporation, respectfully submit that there are additional grounds which require the affirmance of the orders of the District Court and of the United States Circuit Court of Appeals. These are:

1. Petitioner Comstock is not the proper legal party to assert said objection. He has not the legal capacity to sue in the form and style adopted by him in these appeals. Comstock does not represent the Trustee nor has he obtained a prior order of this or any lower Court permitting him to do so; nor does he legally represent any intervening

group of serial 5¼% bonds; nor has he obtained the consent of the Trustee to bring or assert this claim, which by law, Comstock is obliged to do as a prerequisite. By his own admission, Comstock does not stand herein in this Court in any representative capacity. The I. C. C. denied his application to do so. Unless petitioner obtains these prerequisites, he can have no standing in this Court. Otherwise, the Courts will be constantly besieged by a multiplicity of unnecessary or vexatious suits brought either with or without cause at the instance of any one and there would never be a final determination of any issue or a final reorganization of a debtor in a Section 77 proceeding.

2. This petitioner has no legal interest in the claim he asserts. He purchased his securities in 1940, for ten cents on the dollar, years after the allowance of said claim against NOTM properties, and he has failed, therefore, to show vigilance or good faith in the prosecution of objections to said claim. Said petitioner failed to show that he sustained any damage.

3. Comstock has acquiesced in the allowance of said claim as a matter of law. Said petitioner affirmatively established before the District Court by Guy A. Thompson, the Trustee for MOP that he knew about the allowance of the MOP claim against NOTM as long ago as 1935 yet purchased the serial 5¼% bonds of the debtor in 1940, obviously for the purpose of making this belated objection. That petitioner intends to further unnecessarily delay this reorganization, see his brief, page 4, third footnote.

4. Security holders of MOP and those who became security holders of MOP after the allowance of said claim against NOTM properties have obtained as a result thereof certain vested property rights. The previous determination of the Trustee for MOP to allow said claim cannot now be upset by this creditor. To do so would be to deprive all subsequent MOP security holders of their prop-

erty rights without due process of law in contravention of the Fifth Amendment to the Constitution.

5. Petitioner's version of the facts is not in accordance with the proof.

Although petitioner claims "there is remarkably little in the record which is disputed" (Petitioner's Brief, p. 2), he proceeds to give a distorted version of "MOP ownership of NOTM, 1924 to Bankruptcy" (Petitioner's Brief, pp. 5-7). It will serve no useful purpose to here review these facts herein at length.

It is clear that petitioners purposely ignore the System character of MOP's bookkeeping methods and criticize "the dividend policy imposed on NOTM" (Petitioner's Brief, pp. 7-8) and the alleged "matching of simultaneous MOP advances to NOTM and NOTM dividends to MOP" as having been "drained from Brownsville to make possible NOTM dividends to MOP" (Petitioner's Brief, pp. 9-11).

Petitioner would have every ticket office and every facility in the myriad operations of the MOP system pay to itself and only for itself in complete disregard to the welfare or necessities of the entire railroad system MOP functioning as a whole (Petitioner's Brief, pp. 24-26; pp. 28-29).

6. Petitioner's version of the law does not apply to the facts adduced before the District Court.

Petitioner considers the separate units of MOP as being the *cestuis que trustent*, in a fiduciary relationship with MOP management.

We do not so interpret the facts. NOTM properties owed MOP every loyalty of a fiduciary but the reverse is not true. While NOTM was and is being operated as an integral part of the MOP System, MOP was under no reciprocal duty to NOTM.

The burden of petitioner's argument is that Alleghany Corporation's management of MOP was disastrous for MOP and all its subsidiary properties (Petitioner's brief, pp. 14-16; pp. 20-23). To the extent that such was the fact, we have no objection to also charging the \$10,565,226.78 claim with interest against Alleghany's securities or interest in MOP, but we respectfully submit, that said claim must be enforced as already allowed and found, viz., against the NOTM properties.

7. Petitioners admit that a portion of the \$10,565,227 claim (\$9,955,226.78 thereof) was validly pledged as security for loans made to MOP by the RFC and the RCC. (R. 19-21; Petitioners' Brief, p. 62; also R. 176-177; 186-187; 382-386.)

Under authorization of the I. C. C., granted after hearing, MOP pledged two notes evidencing such debt to the RFC and the RCC. The RFC and the RCC claims have been paid by the Trustee for MOP (see footnote, p. 16, *supra*), without objection from petitioners and the order authorizing payment by the Trustee subrogated the claims of the 5½% Convertible Bondholders to the extent of their interest (R. 1188, Ex. 335-357) to the lien of the RFC and the RCC on the pledged collateral, including the pledged portion of the intercompany claim (R. 1157 and 1165).

"The items which made up the total \$10,565,226.78 were clearly specified and evidence of the validity of the debt as consideration for the notes was adduced before the Commission at an early stage of these Section 77 proceedings, and the obligation was deemed to be valid and ahead of New Orleans' (NOTM) stockholder interest in all of the accountings, computations and adjustments resulting in the plan of reorganization determined by the Commission and approved by the Court in 1940. It has also been so considered by the Commission in the plan of reorganization before the court at the time of the hearing and order now appealed from." Quoted from opinion of the Circuit Court of Appeals. (R. IV, pp. 16-17.)

Obviously, if \$9,955,226.78 of the \$10,355,226.78 in said notes are valid, then the balance of said notes evidencing said intercompany claims for "cash advances for operation, interest payments, etc., at various times from March 1929 to February 1933, both inclusive", must also be conceded as valid. (R. IV, p. 16.)

8. The evidence adduced by petitioner failed to make out a case for legal or equitable relief before the District Court.

With the cooperation from the Trustee and the unusual patience and latitude shown, the District Court allowed petitioner unrestricted right to introduce evidence covering transactions of the principal debtor which occurred 36 years ago to wit, from 1912. The result is an unnecessarily voluminous record. Under the ancient documents rule such transactions should not now be disturbed or questioned in any way. Any oral evidence sought to be elicited thereon or any inferences of improper conduct sought to be drawn from parts of such evidence or from witnesses now dead or whose whereabouts are unknown was and is legally incompetent.

The petitioner despite the Court's indulgence failed to make out a claim by clear, competent proof.

Judgment of the United States Circuit Court of Appeals must be affirmed.

POINT VI

Taylor v. Standard Gas Co., 306 U. S. 307, principally relied on by petitioners is clearly distinguishable and inapplicable to the case at bar.

The petitioners have strenuously urged that the decision of this Court in *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307, requires reversal herein.

The United States Circuit Court of Appeals, however, ruled that this Court there had to deal with a situation entirely different. (R. Vol. IV, p. 27.) This Court later said concerning its decision in that case as to the subordination which it there imposed on a parent corporation's claims against the subsidiary:

"This was based on the equities of the case . . . the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary by Standard to the detriment of the public investors."

Pepper v. Litton, 308 U. S. 295, P. C. 308.

"Here", to quote the United States Circuit Court of Appeals,

"the trial court has found on substantial evidence an exactly contrary situation. The stock of the New Orleans (NOTM) has been kept intact and of recognized value through depressions which wiped out vast amounts of such securities, and on full investigation of the facts the court has found the Missouri Pacific's (MOP's) stewardship was faithful and there was no mismanagement or spoliation."

We find no error in the trial court's findings against Comstock in respect to his charges of dereliction of duty by the trustee of the New Orleans (NOTM). Those charges are without merit" (R. IV, p. 27).

There are many other distinctions between the situation presented here and the *Taylor v. Standard Gas & Electric Co.* case. The following are the more obvious:

In the first place, the question presented was based on a plan of reorganization under § 77B of the Bankruptcy Act. The Circuit Court of Appeals by a divided court, approved the District Court's order.

SUPREME COURT OF THE UNITED STATES

Nos. 451-454.—OCTOBER TERM, 1947.

Andrew W. Comstock, a Holder of Missouri Pacific Railroad Company 5½% Secured Serial Gold Bonds, etc., Petitioner,

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v.

Group of Institutional Investors, etc., et al.

New Orleans, Texas and Mexico Railway Company, Debtor, etc., Petitioner,

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v.

Group of Institutional Investors, etc., et al.

Guy A. Thompson, Trustee of the New Orleans, Texas and Mexico Railway Company, etc., Petitioner,

453

v.

Group of Institutional Investors, etc., et al.

Andrew W. Comstock, Petitioner,

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v.

Guy A. Thompson, Trustee of the New Orleans, Texas and Mexico Railway Company, Debtor, et al.

[June 21, 1948.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

Since 1933 the Missouri Pacific, the New Orleans, Texas and Mexico Railway Co. and a number of affiliated rail-

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

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"Comstock's contention that the court erroneously put the burden of proving his charges on him rather than requiring the Missouri Pacific to proceed first to disprove them, is without merit. As the execution of the promissory notes was admitted and at least formal proof of all of the items of advancements making up the debt had been in the record of the Section 77 proceedings for many years before the hearing, the court required only that all the records of the transactions that were questioned be made available for the hearing so that there was the equivalent of a full disclosure by the Missouri Pacific before Comstock was required to proceed with his proof of the charges. In its findings the court stated the facts as it found them to be proven by the whole evidence. It found in detail and in effect that the Missouri Pacific had administered the affairs of the New Orleans in good faith to the advantage of that company; had made the advancements to it for proper purposes; had not caused dividends to be paid out of capital or improvidently in bad faith, and that the asserted indebtedness arose from advancement made by Missouri Pacific to New Orleans for betterments and additions and was valid and should be allowed in items specified, and that the plan of reorganization based as it was in part on recognition of the existence of the debt in question, was fair and equitable and conformable to the requirements of law regarding the participation of the various classes of creditors and stockholders."

We are confronted at the outset with petitioner's delay and conduct and its effect on the duty of this Court and that below to pass on the merits of his objections. Comstock, apparently with general knowledge of the conduct he alleges to be a wrong toward the securities which he now holds, bought them at about 10 cents on the dollar

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nearly seven years after the alleged misconduct had ended. Thus, it was not Comstock who was a victim of any wrongdoing but those in whose hands the securities depreciated to the low point at which Comstock bought. It is apparent that Comstock bought a grievance to exploit and to reap the advantage of its rectification. Those who realized the loss through sales to Comstock could, in no event, be indemnified in this proceeding. From every viewpoint, the delay in asserting these claims is unusual. The District Court found it also prejudicial due to the death of six named witnesses and participants, among others, whose testimony would be important. While it considered the objections barred by laches, it nonetheless adjudged their merits.

We think that, in the reorganization proceeding, the courts may entertain on their merits objections to a plan even if made by one who might be barred from asserting a cause of action in his own behalf, if the subject-matter of the objections is such that it goes beyond the objector's individual interests and affects the fairness and equity of the plan. In view of the amount and position of the claim involved, we do not disagree with the Court of Appeals that such was the case here.

It also is true, as the court below indicates, that this objector made no effort to exhaust or to avail himself of administrative remedies in support of his objection. Neither the objection nor the evidentiary support for it were laid before the Interstate Commerce Commission in its hearings on successive plans of reorganization. The requirement that the Commission "hold public hearings, at which opportunity shall be given to any interested party to be heard and following which the Commission shall render a report" to the court is not provided without a purpose and is not to be ignored by persons with claims or objections to be heard. This issue involved matters with which the Commission and its staff are especially

In the case at bar, there is no approved plan of reorganization. There was *unanimous* affirmance of the District Court's order.

Secondly, Standard Gas & Electric Co. then had investments in various utility properties but had never been interested in oil. (The Deep Rock Oil Corp.)

In the case at bar NOTM is a vital part of MOP's railroad system.

In the next place, petitioner has not established that a fiduciary relationship exists between MOP and its creditor Comstock. There was a definite fiduciary relationship in the *Taylor v. Standard Gas Co.* case.

The right of intervening bona fide bondholders was not there involved and the claim made fell on the wrongdoers. Petitioners, by their inaction after knowledge of alleged wrongdoing involved the rights of innocent creditors and this situation has no counterpart in the case cited by petitioners.

In the case at bar no MOP creditor (except, possibly Alleghany Corp'n) has benefited from the alleged wrongdoing. MOP has been insolvent since 1933. Taylor was not suing as a creditor of Standard but as a minority dissenting stockholder. Comstock is not even a bondholder in due course.

Particularly Convertible Bondholders Group, respondents and other security holders who appear in these proceedings independently of Alleghany Corporation and who were not identified with its management or operation of MOP from 1924 to 1933 and who purchased MOP securities in good faith and for value, surely are guilty of no wrongdoing.

The judgment and decrees of the courts below must be affirmed.

CONCLUSION

The appeals should be dismissed and judgment and orders appealed from should be affirmed.

Dated, New York, N. Y., February 28, 1948.

Respectfully submitted,

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